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**CAPTURED AMERICANS - WAR CRIMINALS  
OR PRISONERS OF WAR**

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**30 November 1972**

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BY

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**(Essay)**

**CAPTURED AMERICANS - WAR CRIMINALS  
OR PRISONERS OF WAR?**

by

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The threat of Hanoi to try American prisoners as war criminals is used as a point of departure to discuss legal issues of the Vietnam War raised by the prisoner question. Differences between customary and treaty international law are focused on opposing positions of the United States and Hanoi on aerial bombing, aggression and prisoner of war treatment. The essay is based on literature search of applicable international law and other relevant materials. The conclusion is reached that the prisoners' future rests not with what their rights are under international law, but on who has the power to interpret the law.

## CAPTURED AMERICANS - WAR CRIMINALS OR PRISONERS OF WAR?

### INTRODUCTION

Since the close of World War II more than 10,000 persons have been tried on charges of war crimes, crimes against peace and crimes against humanity.<sup>1</sup>

On 31 August 1965 Hanoi raised the specter of trying captured Americans on war crimes charges.<sup>2</sup> The United States countered that Hanoi was violating international law in denying to captured Americans prisoner-of-war treatment guaranteed by the 1949 Geneva Conventions.<sup>3</sup>

It is the purpose of this essay to examine the law on these charges.

United States forces have been engaged in combat in the Vietnam War since March 1965. Some of the American bomber and fighter crews flying combat missions over North Vietnam

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<sup>1</sup>Telford Taylor, Nuremberg and Vietnam: An American Tragedy (1970), p. 28.

<sup>2</sup>"Reply from the Government of the Democratic Republic of Vietnam," International Review of the Red Cross, 31 August 1965, p. 527.

<sup>3</sup>US Congress, House, Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, American Prisoners of War in Southeast Asia, 91st Congress, 2d sess. 1970, Hearings, 29 April 1970, p. 1.

US Congress, Senate, Committee on Foreign Relations, American Prisoners of War in Southeast Asia, 91st Congress, 2d sess. S. Rept. 91-705 (1970, pp. 1-21 (hereafter referred to as "Congress, Senate, American Prisoners").

were shot down and captured.

Despite the fact that North Vietnam, South Vietnam and the US were signatories to the 1949 Geneva Convention on treatment of prisoners of war, when the International Committee of the Red Cross offered its offices to the belligerents in 1965 to implement the prisoner of war provisions,<sup>4</sup> North Vietnam rejected the offer on the grounds that American prisoners were war criminals and air pirates liable for trial by North Vietnam tribunals under the principles of the Nuremberg Charter.<sup>5</sup>

Following strong protests from the United States,<sup>6</sup> persuasion by such international figures as the Secretary General of the United Nations and the Pope, and warnings from United States anti-war leaders of the adverse consequences that might follow from such trials, Ho Chi Minh, in response to an inquiry from the Columbia Broadcasting System, declared that no trials were in view.<sup>7</sup>

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<sup>4</sup>"Letter for International Committee of the Red Cross to the Governments of the United States, Republic of Vietnam and Democratic Republic of Vietnam," International Legal Materials, November 1965, p. 1171.

<sup>5</sup>"Red Cross Gets Appeal to Avert Pilot Trials," Washington Post, 19 July 1966, p. A1.

<sup>6</sup>Ibid.

<sup>7</sup>Mary Costello, "Status of War Prisoners," Editorial Research Reports, 26 April 1972, p. 327.

No American prisoners have been tried.<sup>8</sup> The war, however, is not over and there has been no significant headway in securing the prisoners' release.

There is no certainty that American prisoners will not be tried so long as they are held captive by Hanoi.

Any such trials would be significant, not only for the personal jeopardy that would face the prisoners themselves, but because at such trials the prisoners would be the alter ego of the real party being tried, i.e. the United States.

The prisoner question has become symbolic of the greater issues of the Vietnam War, the morality and the legality of both the war itself and the way in which it is being conducted.

One of the leading critics of United States policy in Vietnam and Indochina, Professor Richard A. Falk, Milbank Professor of International Law at Princeton University, not only finds the United States guilty of war crimes in Vietnam, but supports North Vietnam's charges of war crimes by the captured Americans.<sup>9</sup>

These views are shared in varying degrees by others

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<sup>8</sup>Ibid.

<sup>9</sup>Richard A. Falk, ed., International Law and Organization (1968), pp. 14-15.

in the United States.<sup>10</sup> They were the basis for the 1967 Bertrand Russell War Crimes Tribunal in Stockholm where representatives from various countries purported to try the United States in absentia for its participation in the Vietnam War.<sup>11</sup>

On the other hand, a multitude of voices have been raised in support of United States Vietnam policies.<sup>12</sup> For example, Charles Ghequiere Fenwick, a noted scholar on international law declared that "throughout the long struggle, the United States has made every effort to conduct hostilities in accordance with the traditional laws of war."<sup>13</sup>

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<sup>10</sup>"Memorandum of Law of Lawyers Committee on American Policy Toward Vietnam," Congressional Record, Vol. 112, (1966), p. 2666.

Richard A. Falk, "International Law and the United States Role in the Viet Nam War," in The Vietnam War and International Law, Vol. 1, ed. by Richard A. Falk, p. 362, ("The Vietnam War and International Law" is hereafter referred to as "VW and IL").

Quincy Wright, "Legal Aspects of the Viet-Nam Situation," in VW and IL, Vol. 1, p. 271.

Gabriel Kolko, contributor to Chapter 2, "Technology and American Power," in War Crimes and the American Conscience, ed. by Erwin Knoll and Judith Nies McFadden, p. 61.

<sup>11</sup>John Duffet, ed., Against the Crime of Silence, 1968.

<sup>12</sup>John Norton Moore, "International Law and the United States Role in Viet Nam: A Reply," in VW and IL, Vol. 1, p. 401.

John Norton Moore, "The Lawfulness of Military Assistance to the Republic of Viet-Nam," in VW and IL, Vol. 1, p. 237.

R. Hull and J. Novgorod, Law and Vietnam (1968), pp. 237-270.

Neill H. Alfred, Jr., "The Legality of American Military Involvement in Viet Nam: A Broader Perspective," in VW and IL, Vol. 1, p. 349.

H. B. Jacobini, International Law, A Text (1968), p. 282.

<sup>13</sup>Charles Ghequiere Fenwick, Foreign Policy and International Law (1968), p. 130.



It would be an endless task to attempt to analyze all the issues of fact and law raised by the prisoner question. An inquiry into a few of these issues will bring out the general law that applies to the opposing contentions of the United States and Hanoi.

Is aerial bombing legal or illegal?

What is the law on aggressive war?

Is Hanoi violating the law in its treatment of United States prisoners?

#### IS AERIAL BOMBING LEGAL OR ILLEGAL?

The United States made a retaliatory bombing raid on coastal military installations of North Vietnam on 5 August 1964 following North Vietnamese torpedo boat attacks on United States destroyers in the Tonkin Gulf on 2 August and 4 August 1964.<sup>14</sup> This was the first bombing of North Vietnamese territory by United States aircraft.<sup>15</sup>

On 5 February 1965, United States planes began continuous bombing of North Vietnam.<sup>16</sup> Since that time, many and various military targets have been struck.

According to Hanoi and its supporters, United States attacked military targets as well as non-military targets

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<sup>14</sup>Duffett, p. 84.

<sup>15</sup>Ibid.

<sup>16</sup>Ibid.

such as hospitals, schools, churches, dikes and population centers.<sup>17</sup>

The first inquiry into the law is whether the bombing by American pilots of North Vietnam is lawful or unlawful. To analyze this question properly, it is necessary to look at the law that applies to aerial bombardment.

#### Law Contended to Support Hanoi

Some of the legal authorities cited by United States critics in support of Hanoi's contention that United States aerial bombing of North Vietnam is unlawful are the Nuremberg Charter, the 1907 and 1899 Hague Conventions and the 1868 Declaration of St. Petersburg.<sup>18</sup> These prohibited destruction of population centers not justified by military necessity, bombardment of undefended towns, limited the size of explosive projectiles, and prohibited bombing from balloons.

In order to properly evaluate these authorities, it is necessary to examine the nature of international law and its relation to the law of war.

#### The Modern State and Growth of International Law

Today's nation-state system was founded following the Peace of Westphalia in 1648. The new nations were

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<sup>17</sup>Ibid., pp. 89, 133.

<sup>18</sup>Richard A. Falk, et al., eds., Crimes of War (1971), pp. 31, 33.

characterized in Machiavelli's Prince as self-sufficing and nonmoral, separate and irresponsible.<sup>19</sup> These characteristics were embodied in the doctrine of national sovereignty which holds in essence that a state is supreme within its territorial boundaries and independent without.<sup>20</sup> Though separate and independent, these new sovereign states were to become a part of a broader interrelationship. Forces transcending national boarders such as the discovery of America with its impetus for adventure and commerce, religion, the Renaissance and the common feeling of revulsion following the savagery of the Thirty Years War combined to produce a social fabric which recognized the need for rules to govern international relations. This recognition contributed to the growth of international law.<sup>21</sup>

#### Sources of International Law

To learn what international law is as distinguished from how it is created, it is necessary to look to sources of the law. There is no one place to go to find what the Law of Nations is, no code, no one instrument, no one book. The sources of such information, however, are well accepted:

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<sup>19</sup>J. L. Brierly, The Law of Nations (1963), p. 6.

<sup>20</sup>Charles DeVisscher, Theory and Reality in Public International Law (1968), p. 17.

<sup>21</sup>Brierly, pp. 7-8.

they are treaties, custom and practice of states, general principles of law, judicial precedents and text-writers.<sup>22</sup>

Less clear, however, are the questions of (1) how international law comes into being, that is, how it is created, and (2) upon whom it is binding.

#### Nature of Customary International Law

In this respect, there are differences between treaty or conventional law and customary or common law. A study of authorities leads to the conclusion that international law which ought to be binding on all nations is only the law which derives from customary practice between states.<sup>23</sup> A practice of states attains to the stature of customary international law when there is acquiescence<sup>24</sup> of the practice by most of the states of the world for such a period of time that there is a feeling among them, a consensus, that the custom is one which ought to be followed by all states and that a state which fails to abide by it is a transgressor.<sup>25</sup>

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<sup>22</sup>Arthur Larson, When Nations Disagree (1961), p. 24. Brierly, pp. 55-56.

The Paquete Habana, The Lola, 175 U.S. 677 (1900).

<sup>23</sup>Hersh Lauterpacht, Recognition in International Law (1947), p. 176.

<sup>24</sup>Charles Ghequiere Fenwick, International Law (1965) p. 88.

<sup>25</sup>Brierly, p. 59

The emergence of a principle or rule of customary international law requires an agreeable practice between two or more states, its continuation or repetition and a general acquiescence in the practice by other states.<sup>26</sup>

### Treaty Law

The legal effect of treaties is different from customary international law. A treaty is binding only upon the parties to it.<sup>27</sup> This principle was recognized as early as 1625 by Grotius, one of the early writers on the law of nations, when he wrote: "An ordinance, in fact, is not binding upon those to whom it has not been given."<sup>28</sup>

A treaty between two or more states, except where it incorporates provisions of prevailing customary law, is evidence of an intention to either supplement or depart from customary law. It creates a rule which either does not exist or derogates from the existing rules. As further distinguished from customary law, it is in substance an international contract.<sup>29</sup>

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<sup>26</sup>Herbert W. Briggs, ed., The Law of Nations, Cases, Documents and Notes (2d ed., 1952), p. 25.

<sup>27</sup>Elizabeth F. Read, International Law and International Relations (1925), p. 3.

Brierly, p. 57.

<sup>28</sup>Hugo Grotius, "De Jure Belli Ac Pacis" in Classics of International Law, Vol. 2 (1964), p. 45.

<sup>29</sup>W. E. Hall, International Law (1924), pp. 379-395.

### Only Customary Law Binding On All Nations

The only law, therefore, which ought to be binding on all nations is customary international law, the common law of nations.

### Laws of War and International Law

War has been one aspect of interstate relations. Due principally to the influence of medieval chivalry and religious humanitarianism, a body of customary and treaty law evolved whose purpose was to limit suffering and devastation in warfare.<sup>30</sup> This body of law, known as the laws of war, is part of international law.

In accordance with the general rule in international law, the laws of war which are part of customary law are considered binding on all civilized nations.<sup>31</sup> Provisions in treaties pertaining to war are binding only on parties to the treaties.

### Need for Scrutiny

In view of the differences in binding effect between customary and treaty law of war, treaty provisions

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<sup>30</sup>Hamilton DeSaussure, Colonel, "The Laws of Air Warfare: Are There Any?" The International Lawyer, (July 1971), p. 529.

Maurice Hugh Keen, The Laws of War in the Middle Ages (1965), pp. 18-19, 243.

<sup>31</sup>Fenwick, International Law, p. 651.

with regard to war will bear close scrutiny where it is contended that they are binding as international law. Such contentions ought to prevail only where the relevant provisions are declarative of the customary law of nations.<sup>32</sup>

#### Customary Law and Aerial Bombing Lawful

With this brief insight on international law and the laws of war, we return to our inquiry to the law of aerial bombing. Most writers hold that customary international law does not prohibit aerial bombing.<sup>33</sup> In 1936 during the Spanish-Civil War, there was a world protest against such bombing when Germany bombed Guernica and Barcelona. World War II, however, demonstrated the general acceptance by the world's great powers of aerial bombing of population centers on both sides as witnessed by the devastations of London, Coventry, Hamburg, Berlin, Dresden

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<sup>32</sup>Read, p. 3.

<sup>33</sup>M. Greenspan, The Modern Law of Land Warfare (1959), p. 352.

Bryant T. Lynch, "An Inquiry Into the Law of War and Warfare," Texas International Law Journal, (Spring 1972), p. 490.

DeSaussure, p. 529.

and Tokyo, and the atomic holocaust of Hiroshima and Nagasaki.<sup>34</sup>

The fact that noncombatant civilians are killed by aerial bombings does not of itself make the bomber crews guilty of any crime. Killing in the course of belligerent operations, except in violation of the laws of warfare, are normal incidents of war and are not unlawful.<sup>35</sup> To the contrary, it is the belligerent that punishes an act protected by the law of war that commits the war crime.<sup>36</sup> In the Far East war crimes trials, the Japanese judges who had convicted captured allied pilots of war crimes for bombing Japanese cities were tried and executed as war criminals.<sup>37</sup>

#### Treaty Law and Aerial Bombing

Turning to treaty law, what is the relationship of the Nuremberg Charter and the Hague and St. Petersburg Conventions to Hanoi and aerial bombing?

The Nuremberg Charter referred to by Hanoi in its

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<sup>34</sup>Sherwood F. Lapping, Colonel, "The Evolution of Air Warfare," Basis of Power and Conflict, in Air War College Associate Program, Chapter 14, from Lecture (Maxwell Air Force Base: 6 October 1969), p. 17.

<sup>35</sup>Phillip Noel-Baker, contributor to Chapter 1, "Law, Morality, and War," in War Crimes and American Conscience, p. 39.

<sup>36</sup>Taylor, pp. 19-20.

<sup>37</sup>Francis Wharton, A Digest of International Law of the United States, Washington: US Government Printing Office, (1886), p. 826.

<sup>38</sup>DeSaussure, p. 542.

Taylor, p. 141.



charges against the American prisoners provided for individual criminal responsibility for wanton destruction of cities and devastation not justified by military necessity. The Charter and the Judgment in the major war criminals trial, however, did not condemn aerial bombing.<sup>38</sup> In view of the substantial role which the major belligerents had played in aerial bombing, such an effort would have been an exercise in futility.

Since neither North Vietnam nor the Vietcong were signatories to the Hague Conventions or the St. Petersburg Declaration, they could not derive benefit from their provisions unless the provisions were declarative of customary law. As noted before, the widespread aerial bombing practice of World War II indicates that any restrictions on aerial bombing in the St. Petersburg and Hague Conventions had not gained sufficient world consensus to have acquired the universality required by customary law. Moreover, any such restrictions had been so debilitated by changes in weapons and methods of modern warfare that the parties to the treaties themselves did not consider them applicable.<sup>39</sup>

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<sup>38</sup>Office of the US Chief of Counsel for Prosecution of Axis Criminals, "Charter of International Military Tribunal," Nazi Conspiracy and Aggression, Vol. 1, (1946), pp. 4-12.

<sup>39</sup>Lynch, p. 638.

## WHAT IS THE LAW ON AGGRESSIVE WAR?

### Treaty Law

What is the significance of Nuremberg on aggressive war and the prisoner of war question?

The Nuremberg Judgment of the major war criminals trial declared that to initiate a war of aggression is not only an international crime but the supreme international crime.<sup>40</sup> The Nuremberg and Far East war crimes trials have been urged by opponents of United States Vietnam policy as precedents for trying Americans for the war crimes in Vietnam.

The Nuremberg and Far East war crimes trials were held pursuant to authority in an international agreement called the Nuremberg Charter signed by the United States, England and the Soviet Union. It declared that major war criminals of World War II would be tried by an international tribunal and lesser war criminals by national courts wherever the crimes had been committed.

The Charter authorized trials for war crimes, crimes against peace and crimes against humanity. It characterized aggressive war as the crime against peace and provided

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<sup>40</sup>"International Military Tribunal (Nuremberg), Judgment and Sentences," American Journal of International Law, (January 1947), pp. 214-219.

for trial of those persons responsible for the planning, preparation, initiation and waging of such wars. This was the first time in modern history that persons were tried for individual responsibility for an aggressive war.

The convictions in the Nuremberg major war criminals trials for individual responsibility for aggression were based on violations of the 1899 Hague Convention, the Versailles Treaty and the Pact of Paris. The Pact of Paris was signed in 1928 by 63 nations including the major allied and axis powers. It renounced war as an instrument of national policy.

A close reading of the Nuremberg Judgment will show that there was no holding that aggressive war was illegal under customary law. The judgment on the aggression issue therefore sounded on conventional or treaty law. The individual liability of the defendants for aggression was founded on their knowledge of the treaty provisions and their role in planning and waging aggressive war against 12 nations.

Since North Vietnam was neither a party to the Nuremberg Charter nor to the Pact of Paris, it could claim the benefit of their provisions only if these were reflective

of prevailing customary law.<sup>41</sup>

### Customary Law

What does customary law say about the lawfulness of war and, more specifically, of aggression?

War has never been recognized as unlawful by customary law. Such recognition would deny to a state the right of self-defense. Customary law has, on the contrary, recognized that all wars are equally lawful.<sup>42</sup> Francis Lieber stated this principle in 1863 in the first codification of the law of war for the United States Army when he wrote: "The Law of Nations allows every sovereign government to make war upon another sovereign ..."<sup>43</sup>

Aggression for the purpose of conquest has been an accepted state practice from the time of Machiavelli's Prince.<sup>44</sup> It was not until after World War I that efforts

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<sup>41</sup>Lynch, p. 611.

<sup>42</sup>Myres Smith McDougal and Florentino P. Feliciano, Law and Minimum Public Order (1961), p. 525.

Gerald J. Adler, "Targets in War: Legal Considerations," in VW and IL, Vol. 3, quoting from Karl von Clausewitz's "On War," p. 287.

Brierly, p. 35.

Hall, p. 35.

Fenwick, p. 647.

<sup>43</sup>Francis Lieber, A Code for the Government of Armies in the Field, as Authorized by the Laws and Usages of War on Land (1863), p. 17.

<sup>44</sup>Brierly, p. 6.

were made to condemn aggressive war by treaty. The League of Nations and the Pact of Paris are examples.<sup>45</sup>

Thus, wars in self-defense are supported by customary law; treaties have sought to outlaw wars of aggression.

#### Self-Defense or Aggression?

Since international law universally recognizes the law of self-defense,<sup>46</sup> a belligerent charged in the forum of public opinion with aggressive war is often quick to assert the law of anticipatory self-defense. In the Congressional Hearings before the ratification of the Pact of Paris, Secretary of State Kellogg, one of the architects of this treaty, referred to this anticipatory aspect when he said that the United States had the right, not only to take necessary measures for self-defense, but to prevent things that might endanger the country.<sup>47</sup> The defendants at the Nuremberg

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<sup>45</sup>Quincy Wright, "The Power of the Executive to Use Military Forces Abroad," in VW and IL, Vol. 3, pp. 518-519.

<sup>46</sup>Carrol Phillip Jessup, The International Problem Governing Mankind (1947), p. 45.

H. N. Johnson, "Aquina, Grotius and the Vietnam War," in VW and IL, Vol. 2, pp. 204-205.

Wolfgang Friedman, "Intervention, Civil War and the Role of International Law," in VW and IL, Vol. 1, p. 152.

Jacobini, p. 70.

<sup>47</sup>John H. E. Fried, "United States Military Intervention in Cambodia in the Light of International Law," in VW and IL, Vol. 3, p. 107.

trials contended that Germany's conquest was self-defense against Bolshevism.<sup>48</sup> Both Hanoi and the United States claim self-defense to the other's aggression.<sup>49</sup>

Issues of self-defense or aggression cannot be conclusively determined except by total victory by one side over the other. The victor then has the power to determine who is to be condemned as the aggressor and who to be vindicated by the law of self-defense.

**IS HANOI VIOLATING THE LAW IN ITS TREATMENT OF UNITED STATES PRISONERS?**

**Treaty Law**

The United States has declared that Hanoi has been violating international law by failing to abide by the 1949 Prisoners of War Convention which the United States, North Vietnam and South Vietnam signed.<sup>50</sup> In signing the treaty, North Vietnam provided that prisoner of war status would not

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<sup>48</sup>Robert H. Jackson, The Nürnberg Case (1947), p. 148.

<sup>49</sup>"Reply from the Government of the Democratic Republic of Viet Nam," p. 527

Leonard C. Meeker, "The Legality of the United States Participation in the Defense of Viet-Nam," Department of State Bulletin, (28 March 1966), pp. 474-489.

<sup>50</sup>"The Prisoner of War Problem," American Enterprise Institute, (28 December 1970), p. 3.

be accorded to prisoners prosecuted and convicted of war crimes.<sup>51</sup>

The 1949 Geneva Prisoner of War Convention provided for notification by respective belligerents of the names of prisoners, their receiving and sending mail and packages, exchanges of sick and wounded, and inspection of prisoner of war camps by the International Committee for the Red Cross or other neutral agency to assure that humanitarian treatment and other provisions of the treaty were honored.<sup>52</sup>

Contrary to the provisions of that treaty, North Vietnam has not permitted the International Committee of the Red Cross to inspect prisoner of war camps and has

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<sup>51</sup>"Geneva Convention Relative to the Treatment of Prisoners of War, 1949," in VW and IL, Vol. 3, p. 495, reproducing Article 85: "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the Convention," and North Vietnam's Reservation to Article 85: "The Democratic Republic of Vietnam declares that prisoners of war prosecuted and convicted for war crimes or for crimes against humanity, in accordance with the principles laid down by the Nuremberg Court of Justice, shall not benefit from the present Convention, as specified in Article 85."

<sup>52</sup>Diplomatic Conference, for the Establishment of International Conventions for the Protection of Victims of War, Geneva Conventions for the Protection of War Victims, Geneva, 1955, (hereafter referred to as "Diplomatic Conference").

Department of State, Protection of War Victims; Prisoners of War, Convention with Annexes, dated at Geneva, 12 August 1949.

otherwise failed to abide by the Convention.<sup>53</sup> North Vietnam as well as the Viet Cong have maintained, however, that prisoners have been treated humanely.<sup>54</sup>

#### Treaty Violations Justified?

Although North Vietnam has not gone beyond its initial "war criminals" charges against the captured American pilots to justify its failure to accord them 1949 Geneva Convention prisoner-of-war status, it might advance the arguments that (1) in view of its war criminal charges against the Americans, its exception of war criminals to the treaty rights takes the Americans out of its provisions; and, (2) it is retaliating for atrocities by United States and South Vietnam against Viet Cong and North Vietnam captives.<sup>55</sup>

#### By Construction of Proviso

According to North Vietnam's proviso to the 1949 Geneva prisoner treaty, prisoner-of-war status would not

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<sup>53</sup>"Congress, Senate, American Prisoners," p. 3.

<sup>54</sup>Douglas Pike, Viet Cong (1966), pp. 266-267.

Seymour R. Hersh, "P.O.W.'s Secondary, Hanoi Says," New York Times, 24 March 1972, pp. 1, 4.

<sup>55</sup>Howard S. Levie, "Procedures for the Protection of Prisoners of War in Viet-Nam: A Four-Way Problem," American Journal of International Law (September 1971), p. 210.

Carroll Kilpatrick, "U.S. Backs Geneva Pact on POWs," Washington Post, 14 August 1965, p. A1.



be afforded to persons presecuted and convicted of war crimes. Although the wording is clear, the American prisoners would be subject to North Vietnam's construction of the proviso. A United States tribunal would have no difficulty in holding that since there had been no trials of the prisoners on charges of war crimes, they are entitled to treaty prisoner-of-war status. Hanoi by construction might justify its position that the process for trial and conviction was underway when the American prisoners were first declared to be war criminals.

Construction of an international agreement thus becomes an instrument and a reflection of national policy.<sup>56</sup> The important point is that in pursuit of national policy, the same law can be interpreted by both sides but with different results.<sup>57</sup>

#### By Retaliation

What are the legal merits to the argument that the Geneva Conventions should not be applied because of retaliation to alleged American and South Vietnamese atrocities? Although reprisals have been condemned internationally

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<sup>56</sup>Briggs, p. 23.

<sup>57</sup>Percy Edward Corbett, Law and Society in Relations of States (1951), p. 229.

by treaty, their legitimacy is recognized by customary international law.<sup>58</sup> A reprisal is conduct toward an enemy that would normally be a war crime but which is justified as necessary to prevent the enemy from continuing to violate the laws of war.<sup>59</sup> It is closely akin to the law of retaliation under which one power may inflict upon the subject of another power death, imprisonment or other hardship, in retaliation for similar injuries imposed upon its own subjects. For example, when South Vietnam executed three Viet Cong prisoners, the Viet Cong executed three American prisoners. No further executions were carried on by South Vietnam.<sup>60</sup> The effectiveness of the doctrines of reprisal and retaliation illustrates the recognition in the law that justice rests on the successful threat of force or the resort to it.

#### Customary Law and Prisoner Treatment

Aside from treaty obligations, what is the international customary norm for treatment of war prisoners?

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<sup>58</sup> McDougal and Feliciano, pp. 80, 679-689.

"The Naulilao Incident," in Briggs, pp. 951-953.

"The Caroline Incident," in Brierly, p. 405.

Taylor, p. 54.

<sup>59</sup> Hersch Lauterpacht, ed., Oppenheims International Law, A Treatise, (7th ed., 1952), p. 143.

<sup>60</sup> Alexander Casella, "The Politics of Prisoners of War," The New York Times Magazine, 28 May 1972, p. 26.

The practice of states over the centuries has evolved from treating war prisoners as personal chattel of their military captors with the concomitants of murder, torture, slavery or ransom, to considering them an obligation of the capturing state with the fundamental requirement that they be treated humanely.<sup>61</sup> The degree of humanity exercised toward prisoners depends in large measure on the captor's concern for the treatment of its own captured forces. The treatment itself becomes a function of the laws of retaliation and reprisal tempered by the cultural attitudes toward human worth by the societies concerned.

#### Professed Prisoner Treatment

The communists in Vietnam in apparent effort to comply with customary law have steadfastly maintained that United States prisoners have been treated humanely. The United States and its allies maintain that they go farther, that is, that in their treatment of North Vietnamese and Viet Cong prisoners, they comply with the standards of the 1949 Geneva Prisoner of War Convention.<sup>62</sup>

#### CONCLUSION

It is necessary to distinguish between customary

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<sup>61</sup>Diplomatic Conference, p. 1.

<sup>62</sup>Kilpatrick, p. A1.

international law and international agreements in determining legal issues arising out of the prisoner of war question.

All nations including North Vietnam and the United States are bound by customary international law. International agreements are binding only between the signatories. By like token, nations that are not parties cannot claim benefits from the agreements.

Though there may be political bases for charges by Hanoi and the United States that the other is guilty of aggression in Vietnam, customary international law recognizes the right of one nation to make war on another. This right is not limited by any treaty between Hanoi and the United States.

The same holds true for aerial bombing. There is no prohibition against it in customary law. Treaties that may have intended to limit aerial bombing are likewise of no avail in that Hanoi was never a party to them. Moreover, changes in warfare have so debilitated these treaties that even the parties to them no longer consider them binding.

Neither the war nor aerial bombing therefore have any basis in international law as grounds for Hanoi to try the captured Americans as war criminals.

But both Hanoi and the United States are parties to the 1949 Geneva Prisoners of War Convention. North Vietnam's proviso to the Convention clearly says that prisoners who are prosecuted and convicted of war crimes are not to benefit from the convention.

No American prisoners have been tried or convicted. Nevertheless, Hanoi has not accorded them Geneva Convention rights. Has Hanoi violated the Geneva Convention? Are Hanoi's leaders international outlaws?

So long as there is no conclusive military victory by one side or the other and no impartial tribunal to interpret and apply the law except by consent of the antagonists, each side will interpret the law as it sees fit. Policy considerations cannot be discounted where there is room for such discretion.

Power therefore becomes the supreme authority for interpreting and applying the law between belligerents. It is power that decides what the law means. And it is the viability of a nation which gives it the capability to maintain a position on international law different from that of an opponent.

Justice for the American prisoners accordingly becomes a function of the relative strength of the United States. The prisoners' future, therefore, turns not on what

their rights are under international law, but rather on the relative power of the United States and Hanoi to interpret and apply the law.

A noted scholar has said: "In the context of continuing hostilities, and until an effective centralized and effective sanctions process is achieved in the world arena, belligerents have to police one another and enforce the laws of war against each other."<sup>63</sup>

A handwritten signature in cursive script that reads "Christ Christ". The signature is written in black ink and is positioned above a horizontal line.

Christ Christ, LTC  
296-12-4920

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<sup>63</sup>Professor Myron S. McDougal of the Yale Law School, in McDougal and Feliciano, p. 681.

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